

BEFORE THE APPEALS BOARD

**FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JOHN PILAND

Claimant

VS.

KANSAS LABOR, INC.

Respondent

AND

**KANSAS BUILDING INDUSTRY
WORKERS COMPENSATION FUND**

Insurance Carrier

Docket No. 198,998

ORDER

Claimant appeals from a May 23, 1995 Preliminary Hearing Order of Administrative Law Judge Floyd V. Palmer which denied claimant's request for preliminary benefits.

ISSUES

On appeal, claimant contends the Administrative Law Judge exceeded his jurisdiction in denying benefits because the evidence establishes that claimant is in need of medical treatment and temporary total disability compensation as a result of an accidental injury which arose out of and in the course of the claimant's employment with respondent. The sole issue before the Appeals Board is whether claimant has met his burden of proving that he sustained personal injury by accident arising out of and in the course of his employment with respondent.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record and considering the briefs of the parties, the Appeals Board finds, for preliminary hearing purposes, as follows:

The finding by the Administrative Law Judge that claimant has not carried his burden of proving that he met with personal injury by accident arising out of and in the course of his employment with respondent should be affirmed. The weight of the credible evidence persuades this trier of fact that the claimant's injury did not occur in the manner to which claimant testified. The disputed issue of whether claimant suffered personal injury arising out of and in the course of his employment with respondent turns primarily on the credibility and believability of the witnesses. The Administrative Law Judge had an opportunity to observe the testimony of the witnesses. He determined the testimony of respondent's witnesses, both the live testimony and the affidavit and exhibits, to be more credible and believable than the testimony given by claimant. Based upon the Appeals Board's review of the record as a whole, we find that the Order by the Administrative Law Judge should be affirmed.

In affirming the finding of the Administrative Law Judge that the accident did not arise out of and in the course of the employment, the Appeals Board need not reach, nor does the Appeals Board find there to exist an issue as to notice. The claimant correctly points out that respondent and its insurance carrier stipulated in the record that notice was timely given and there is no evidence that they withdrew or requested to withdraw their stipulation. The conflicting testimony between claimant and the respondent's witnesses is, however, relevant as to the credibility to be given the witnesses as to the issue of whether the injury was work related. That evidence was therefore properly considered by the Administrative Law Judge for that limited purpose and was also considered for that purpose by the Appeals Board.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the May 23, 1995 Order Denying Compensation of Administrative Law Judge Floyd V. Palmer should be, and the same is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of August 1995.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Beth Regier Foerster, Topeka, KS
Robert L. Roberts, Topeka, KS
Floyd V. Palmer, Administrative Law Judge
Philip S. Harness, Director